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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN D. COPANOS & SONS, INC. AND JOHN D. COPANOS, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether and to what extent the Fifth Amendment privilege against compelled self-incrimination applies to an individual who is the president of a corporation and the custodian of its records when the subpoena compels the production of corporate documents.

2. Whether a government requirement that records be kept, amounts to a waiver of a Fifth Amendment claim against the act of production when the possibility of criminal prosecution exists upon production of the documents.

PARTIES

The parties to the proceedings below were the Petitioners, John D. Copanos and Sons, Inc. and John D. Copanos, and the Respondent, the United States of America.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNDER SEAL, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, John D. Copanos & Sons, Inc. and John D. Copanos (hereinafter Petitioners) respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 28, 1987.

OPINIONS BELOW

On December 28, 1986, the United States District Court for the District of Maryland (Northrop, J.) denied Petitioners' Renewed Motion to Quash Grand Jury Subpoena. *In re Grand Jury Subpoena, June 12, 1986*, 658 F. Supp. 387 (D. Md. 1986); 23a.[1] On appeal, the United States Court of Appeals for the Fourth Circuit affirmed, relying *in toto* on the analysis and conclusions of the District Court in an unreported per curiam opinion on September 28, 1987. 29a.

[1] References to material in the Appendix to this Petition are designated "___a."

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the District Court's Order denying Petitioners' Renewed Motion to Quash Grand Jury Subpoena was dated September 28, 1987. This petition is filed within sixty (60) days of that date. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254(1). The District Court had jurisdiction over this cause pursuant to 18 U.S.C. Section 3231.

CONSTITUTIONAL PROVISION INVOLVED
UNITED STATES CONSTITUTIONAL AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

On June 12, 1986, the grand jury issued a subpoena duces tecum to John D. Copanos & Sons, Inc. The subpoena was served on a related corporation and was properly served upon John D. Copanos & Sons, Inc. on July 24, 1986; it requested the production of voluminous business documents relating to the manufacture of pharmaceuticals.[2] Although the subpoena was directed to John

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[2] Specifically, the subpoena duces tecum required production, *inter alia*, of receiving records, inventory use records, receiving and inventory records for aspartame, batching records, master production and

D. Copanos & Sons, Inc., it also requested records generated by "all affiliate predecessor and successor corporations, partnerships and other legal entities, and all officers, agents, servants, employees and or consultants. . . ." 13a.

On July 1, 1986, John D. Copanos & Sons, Inc. filed a Motion to Quash the subpoena on the grounds that it was improperly served, that compliance with the subpoena would be oppressive and unreasonable and that the subpoena violated the Fourth Amendment. The District Court denied the Motion to Quash on October 3, 1986, and ordered John D. Copanos & Sons, Inc. to begin the production of documents. 8a. A Renewed Motion to Quash Grand Jury Subpoena was filed on October 29, 1986 by John D. Copanos & Sons, Inc. and John D. Copanos, the president of John D. Copanos & Sons, Inc., which argued that production of the subpoenaed documents would violate John D. Copanos' individual privilege against self-incrimination. In an opinion rendered on December 18, 1986, the District Court denied the Renewed Motion to Quash Grand Jury Subpoena, concluding that in the circumstances presented, John D. Copanos, as a representative of John D. Copanos & Sons, Inc. and as custodian of the documents subpoenaed, could not rely upon the Fifth Amendment privilege to withhold production of the subpoenaed documents. 23a.

Petitioners filed a timely appeal to the United States Court of Appeals for the Fourth Circuit. On September 28, 1987, the Court of Appeals affirmed; adopted the lower court's decision and remanded the case for entry of

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control records, laboratory test records of components, distribution records, deficient products records, returned drug records, investigation records, personnel records, media fill records, equipment records, complaint records and consultant reports from 1983 through 1985.

an order of intervention, *nunc pro tunc* as to John D. Copanos individually.[3] 29a.

John D. Copanos & Sons, Inc., a corporation organized pursuant to the laws of Florida, is engaged in the distribution of generic prescription drugs. Stock in the company is held by four shareholders. Its founder and president, John D. Copanos, owns 97 per cent of the stock while three of his children each own one per cent. None of the children are employed by the corporation. John D. Copanos is the custodian of the subpoenaed records by virtue of the fact that he is the only person familiar enough with all of the documents to be able to locate and produce them. The great majority of the subpoenaed records have been prepared and maintained pursuant to 21 C.F.R. Part 211, Subparts J and K, and a consent decree entered into by the parties on November 4, 1985. 21a.[4]

Although the Government has not specifically informed John D. Copanos that he is the target of a grand jury investigation, it is apparent that he is indeed a target, and the government does not deny this fact. The potentially incriminating nature of the act of production of the records subpoenaed is beyond dispute.

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[3] Originally, John D. Copanos was not named as a party below; however, he joined in the filing of the October 29, 1986, Renewed Motion to Quash Grand Jury Subpoena. Because he was in effect treated as a party below, the Fourth Circuit ruled that he should be granted such intervention status.

[4] The consent decree resulted from a civil suit filed by the Government against the corporation, its president and another individual alleging violations of the Food, Drug and Cosmetic Act. 21 U.S.C. 301 *et seq.*

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts with Decisions of Other Circuit Courts of Appeals.

The question of whether the Fifth Amendment affords protection from the production of business records was first specifically addressed by this Court in *Bellis v. United States*, 417 U.S. 85 (1974). The holding that the Fifth Amendment privilege does not apply to an organization, which the Court recognized as an entity apart from its members, became known as the "collective entity doctrine." 417 U.S. at 91-93. This doctrine was based on two primary rationales; first, a recognition that the Fifth Amendment was not meant to restrict valid governmental regulation of economic entities; and second, a continued application of the traditional Fifth Amendment analysis, which had long been based on considerations of the private versus public nature of documents. *Id.*

Two years later, in *Fisher v. United States*, 425 U.S. 391 (1976), the Court refocused its analysis of Fifth Amendment protections by abandoning the traditional privacy analysis it had used to date and adopting a two-pronged test which considered simply whether an individual's act of producing evidence was both testimonial and compelled. After *Fisher*, so long as both requirements are satisfied, Fifth Amendment protection is extended to the act of production.

After the landmark *Fisher* case, the Court in *United States v. Doe*, 465 U.S. 605 (1984), directed its attention to the question of whether a sole proprietor could be forced to incriminate himself by being required to produce subpoenaed documents of his business entity which were in his possession or control. Although the contents of the documents were not protected, the Court decided that the Fifth Amendment's protection against self-incrimination extended to the sole proprietor's *act* of producing business records subpoenaed by the grand jury. As the Court stated

in *Doe*, sufficient personal compulsion was present because by producing the documents, the subpoenaed individual would admit the existence of the records, that the records were in his possession and that the records were authentic. 465 U.S. at 612-14.

Since *Doe*, the vitality of the collective entity doctrine has become a continuing source of question and even speculation. Although this Court has not yet ruled specifically on the continued validity of the collective entity doctrine enunciated in *Bellis*, it would appear that *Fisher* and *Doe* both significantly undercut its rationale. *Fisher* eradicated the privacy analysis which was seminal to the *Bellis* holding. *Doe* further undercut the collective entity doctrine by making clear that the structure of a business entity alone should not be dispositive in analyzing the scope of Fifth Amendment protections. "[T]he artificial entities exception has no validity insofar as it denies the privilege to representatives of corporations, labor unions, and partnerships who may be personally incriminated by production of the organization's documents." R. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 Va. L. Rev. 1, 109 (1987). At a minimum, the issue of whether an individual such as John D. Copanos can be compelled to produce potentially incriminating corporate records, held in a representative capacity, has been the subject of disagreement among the Circuit Courts of Appeals.

The Third Circuit in *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3d Cir. 1985) (*en banc*), held expansively that a custodian of corporate records cannot be compelled to produce those corporate records in response to a subpoena addressed to him in his representative capacity, when production would amount to testimonial self-incrimination. The Third Circuit reasoned that the real issue after *Fisher* and *Doe* concerns the communicative

and incriminating nature of the disclosures sought to be compelled and not the nature of the entity which owns the documents nor the contents of the documents. *Id.* at 528. Thus, the Third Circuit declined to distinguish *Doe* on the grounds that it involved a sole proprietorship because the key inquiry—whether the documents subpoenaed are testimonial and compelled—is entirely separate and in no way affected by the nature of the entity which owns the documents. *Id.* The rationale of the Third Circuit in *Brown* has been adopted and applied in other decisions. *See, e.g., In re Grand Jury Empanelled,* 773 F.2d 45 (3d Cir. 1985).

The Fourth Circuit has also addressed this issue, and taken a somewhat middle ground. The Fourth Circuit acknowledges that there are certain instances when a corporate representative may properly invoke a personal Fifth Amendment privilege. *United States v. Lang,* 792 F.2d 1235, 1240-41 (4th Cir.), *cert. denied,* ____ U.S. ____; 107 S.Ct. 574 (1986). The opinion in *Lang* notes that the collective entity doctrine has no general application in those situations where the corporate custodian would be compelled to incriminate himself by the production of corporate records. Nevertheless the Fourth Circuit, relying on the reasoning of the Second Circuit's opinions in *In re Two Grand Jury Subpoenae Duces Tecum,* 769 F.2d 52, 57 (2d Cir. 1985), and *In re Grand Jury Subpoenas Issued To Thirteen Corporations,* 775 F.2d 43, 46 (2d Cir. 1985), *cert. denied,* ____ U.S. ____; 106 S.Ct. 1459 (1986), held that when such situations arise, the corporation must comply with the subpoena by appointing another person or agent to produce the documents, thereby potentially avoiding the incriminatory act of production by the individual who asserts the Fifth Amendment privilege. *Lang,* 792 F.2d at 1240-41.

Yet a third approach, in contrast to both the reasoning of *Brown* and the reasoning of *Lang,* concludes that the

Court's decision in *Doe* did not, in any sense, signal a retreat from the collective entity doctrine. Accordingly, these Circuits have found that the compelled production of corporate documents does not violate a corporate custodian's Fifth Amendment privilege, even though the production of documents would have been protected if the entity were a sole proprietorship. *See, e.g., In re Grand Jury Subpoena (Lincoln),* 767 F.2d 1130, 1131 (5th Cir. 1985);[5] *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143 (6th Cir.), *cert. denied,* 474 U.S. 1033 (1985); *In re Grand Jury Subpoena* 784 F.2d 857 (8th Cir.), *cert. granted, sub nom., See v. United States,* ____ U.S. ____; 107 S.Ct. 59, *cert. dismissed,* ____ U.S. ____; 107 S.Ct. 918 (1986); *United States v. Malis*, 737 F.2d 1511 (9th Cir. 1984); *In re Grand Jury Proceedings (Vargas),* 727 F.2d 941 (10th Cir.) (on rehearing), *cert. denied,* 469 U.S. 819; (1984); and *In re Grand Jury Subpoena Duces Tecum (Ackerman),* 795 F.2d 904 (11th Cir. 1986). The Sixth and Eighth Circuits, although holding that Fifth Amendment protections do not attach prior to production of a corporate entity's documents, have tempered their respective holdings by stating that any subsequent production by the custodian is subject to a motion to suppress. *In re Grand Jury Proceedings (Morganstern),* 771 F.2d at 148; *In re Grand Jury Subpoena*, 784 F.2d at 861.

Finally, it should be pointed out that certiorari was granted in the Eighth Circuit case, *In re Grand Jury Subpoena*, 784 F.2d 857, a case which addressed the precise issue of the validity of the corporate entity doctrine in light of *Doe* and its progeny.[6] Unfortunately, because the

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[5] Despite its conclusion, the Fifth Circuit inconsistently recognized that if a subpoena of corporate records compelled the record custodian to make incriminating disclosures, those communicative disclosures could be protected by the Fifth Amendment.

[6] See v. United States, ____ U.S. ____; 107 S.Ct. 918 (1986), was dismissed pursuant to Sup. Ct. R. 53.

parties dismissed the case before this Court had an opportunity to render an opinion, the issue still remains unresolved. The fact that no bright line rule exists has led to obvious confusion and resulted in the adoption of at least three divergent interpretations among the Circuits. The issue of whether and to what extent the Fifth Amendment privilege applies to a representative of a corporation when a subpoena has been issued for production of corporate documents demands clarification by this Court.

B. The Decision Below Decided An Important Question of Federal Law Which Has Not Been, But Should Be, Settled By the Court.

The decision below found that an element of personal compulsion as to John D. Copanos was lacking and that it was therefore unnecessary to address whether a Fifth Amendment privilege could be asserted to protect the production of records required to be kept by the Government. *In re Grand Jury Subpoena, June 12, 1986*, 658 F. Supp. at 392-93. 21a. The opinion of the District Court, however, noted that the contents of documents kept pursuant to federal regulations, may in some instances, be considered compelled and therefore protected from production. *Id.* at n. 6. Whether the "required records exception" to the Fifth Amendment survives *Fisher* and *Doe,*[7] is an issue which needs to be addressed by this Court, particularly since the act of production could entail testimonial self-incriminating evidence which might lead to criminal prosecution.[8]

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[7] In *Doe*, the Court made a specific point of noting that both *Doe* and *Fisher* involved documents "which were voluntarily prepared and which therefore cannot be said to contain testimonial evidence in and of themselves." 465 U.S. at 613, n.9, quoting from the Court of Appeals decision below.

[8] The instant case presents a particularly appropriate vehicle for addressing this issue. The Federal Food, Drug, and Cosmetic Act, under which the bulk of the subpoenaed records were required to be main-

The required records exception, which provides that the Fifth Amendment does not extend to "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subject of governmental regulation, and the enforcement of restrictions validly established", had its genesis in *Shapiro v. United States*, 335 U.S. 1, 17 (1948). Like the collective entity doctrine, the required records exception was based in part on an inquiry of whether the documents subpoenaed were of a private or public nature. *Grosso v. United States*, 390 U.S. 62, 68 (1968). The rationale for the doctrine was based on the notion that records required by law to be kept assumed a "public aspect", which made them at least analogous to public documents. *Id.* After the *Fisher* and *Doe* opinions however, the Court's focus shifted from the traditional public-private analysis to a determination of whether the production of documents is testimonial and compelled. This shift raises the important question of the continued validity of the required records exception to the Fifth Amendment privilege, and whether that exception can stand side by side with the compelled testimonial standard articulated in *Fisher*.

While several Circuit Courts of Appeals have considered the continued viability of the required records exception, no Court which has taken an expansive view of the Fifth Amendment privilege and applied it to a custodian's production of corporate documents has ruled on whether the required records exception survived *Doe*.

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tained, is a strict liability statute. John D. Copanos can be criminally prosecuted solely in his role as the responsible agent of the corporation, even if he had no actual knowledge of any wrongdoing. United States v. Park, 421 U.S. 658 (1975). This is not a theoretical problem because it is FDA policy to seek criminal sanctions against the highest responsible corporate official at whose doorstep it can lay responsibility for an alleged violation or against those with the power to have prevented it.

Only those Circuits which have refused to extend the *Fisher* and *Doe* protection to corporate custodians have had occasion to grapple with this difficult question. *In re Grand Jury Subpoena Duces Tecum (Underhill)*, 781 F.2d 64 (6th Cir.), *cert. denied*, ____ U.S. ____; 107 S.Ct. 64 (1986), decided that *Doe* did not weaken the required records exception. The reasoning of *Underhill* was followed in *In re Two Grand Jury Subpoenae Duces Tecum*, 793 F.2d 73 (2d Cir. 1986), and in *In re Grand Jury Proceedings (Doe & Roe)*, 801 F.2d 1164 (9th Cir. 1986). These Circuits, however, also decided that an individual *cannot* claim a Fifth Amendment privilege in response to a subpoena for corporate documents. The Third Circuit, which has acknowledged that an individual can assert a Fifth Amendment privilege in response to a subpoena for corporate documents, may reach a far different conclusion as to the vitality of the required records exception.

Determination of whether an individual facing criminal prosecution has waived Fifth Amendment protections by engaging in a regulated activity, thus, remains unsettled. It would appear that the regulatory rationale alone is an insufficient basis for requiring an individual to incriminate himself by producing an organization's documents. *See*, Comment, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 Harv. L. Rev. 640 (1986). The problem involves a delicate balancing of the Fifth Amendment privilege against self-incrimination and the Government's interest in the disclosure of information. *Marchetti* v. *United States*, 390 U.S. 39 (1968), for example, presents one situation where the Court decided that the constitutional protection of the Fifth Amendment outweighed requirements for the reporting of illegal activities. Although *Doe* involved documents which were voluntarily prepared, the Court therein left the door open to decide the issue of whether a Fifth Amendment privilege could apply to records required to be maintained. The resolution of this issue requires the guidance of this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CRIMINAL NO. N-86-2126

IN THE MATTER OF THE GRAND JURY
SUBPOENA ON JULY 12, 1986

MEMORANDUM

To aid in its investigation of illegal practices in the manufacture of prescription drugs, the grand jury in the District of Maryland issued a subpoena duces tecum to a corporation[1] involved in the manufacture of such drugs. The subpoena of June 12, 1986 commanded the production, by July 1, 1986, of a variety of documents, most of which were prepared by the subpoenaed party's manufacturing and quality control personnel during the period of 1983-1985. The corporation has estimated that full compliance with the subpoena would require the production of approximately one million documents.

Pursuant to Fed. R. Crim. P. 17(c), the corporation filed a motion to quash the subpoena contending that; 1) the subpoena was improperly served; 2) compliance with the subpoena would be oppressive and unreasonable, and 3) that the subpoena violates the Fourth Amendment prohibition against unreasonable search and seizure. Thereafter, the parties attempted to resolve their dispute by working out an alternative schedule for the production of documents, but no agreement was reached. The government then moved for an order to compel compliance with

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[1] In the interest of preserving the continued secrecy of the ongoing grand jury investigation which produced this subpoena, the subpoenaed corporation will simply be referred to as 'the corporation' throughout this opinion. The original motion filed in this sealed matter identifies the subpoenaed parties.

the subpoena. No hearing is necessary. Local Rule 6. For the reasons discussed below, the motion to quash is denied and the corporation is ordered to begin production of documents in compliance with the modified schedule set out in the attached order.

As a threshold matter, the corporation asserts that the subpoena was improperly served because the person upon whom it was served was not qualified to accept service. The subpoena was initially served on an individual in the employ of a company which shared the premises with the corporation being subpoenaed. The exact relationship of this employee and his employer to the corporation involved in this case is unclear from the papers submitted by the parties. On July 24th, however, the government reserved the corporation by delivering the subpoena to an accountant employed by the corporation.

Service of a subpoena may be made upon a corporation through an officer or agent who is either explicitly or implicitly authorized to accept service of process. See Fed. R. Crim. P. 17(d); *In Re Grand Jury Subpoenas Issued to Thirteen Corps.*, 775 F.2d 43, 46 (2d Cir. 1985), *cert. denied, Roe v. United States*, ____ U.S. ____, 106 S.Ct. 1459, 89 L.Ed. 2d 716 (1986); *In Re Electric & Musical Indus. Ltd., Middlesex Eng.*, 155 F. Supp. 892, 893 (S.D.N.Y. 1957); Wright Fed. Practice & Procedure; Criminal 2d § 276. An employee's involvement in the financial affairs of a corporation may be sufficient to establish his identity as an agent implicitly authorized to accept service of a subpoena. See *Thirteen Corps*, 775 F.2d at 46.

Viewing the evidence presented in this case, the Court finds that the corporation was properly served on July 24th, 1986 when the subpoena was delivered to the accountant, an agent of the corporation. Hence, we need not address the propriety of the government's earlier attempt at service since any defect has been cured. Compare, *Free*

State Receivables, Ltd., v. Corp. of New Jersey, 76 F.R.D. 85, 87 (D. Md. 1977) (court dismissed complaint due to insufficiency of service of process where plaintiff, though aware of motion to quash service, did not attempt to perfect service after the original filing of the complaint).

Next, the corporation argues that the subpoena should be quashed on the grounds that it is oppressive and unreasonable. The subpoena as issued on June 12, called for the production of sixteen categories of original documents.[2] It directed that each document be numbered consecutively, organized by category and labeled accordingly. As originally served, the subpoena allowed the corporation eleven working days within which to accomplish this task.

The corporation contends that the subpoena is oppressive due to the large amount of documents that have been requested. Though the subpoena calls for originals, the corporation asserts that they would find it necessary to photocopy all the documents before handing the originals over to the government because most are required by law to be kept at the corporation's place of business.[3] This time consuming photocopying operation could only be conducted, according to the corporation, if either outside

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[2] Specifically, the subpoena requests the production of Receiving Records, Inventory Use Records, Receiving and Inventory Records for Aspartame, Batch Records, Master Production and Control Records, Laboratory Test Records, Laboratory Test Records of Components, Distribution Records, Deficient Product Records, Returned Drug Records, Investigation Records, Personnel Records, Media Fill Records, Equipment Records, Complaint Records and Consultant Reports.

[3] Regulations of the U.S. Food and Drug Administration, 21 C.F.R. § 211.180, require companies involved in the manufacture of drugs to maintain production control and distribution records relating to such drugs "at the establishment where the activities described in such records occurred . . ." 21 C.F.R. § 211, 180(C).

people, unfamiliar with the plant's filing system and operations, are brought in to do the job, or the plant shuts down so that its own employees could do the work. In addition, the corporation challenges the reasonableness of the subpoena's document identification requirements and time limits.

Rule 17(c) of the Federal Rules of Criminal Procedure explicitly grants the court the power to quash or modify a subpoena duces tecum if compliance would be unreasonable or oppressive. *In Re Grand Jury Subpoena Duces Tecum issued to First National Bank of Maryland*, 436 F. Supp. 46, 50 (D. Md. 1977). In testing the reasonableness of a challenged subpoena, courts have traditionally examined three components; the relevance of the requested documents to the investigation, the specificity of the request and the reasonableness of the time period covered by the request. *In Re Grand Jury Subpoena Duces Tecum*, 342 F. Supp. 709, 712 (D. Md. 1972), *United States v. Gurule*, 437 F. 2d 239, 241 (10th Cir. 1970), *cert. denied, Baker v. United States*, 403 U.S. 904, 91 S.Ct. 2202, 29 L.Ed. 2d 679 (1971).

Increasingly, however, courts have also considered the potential financial impact of compliance on the subpoenaed party. Thus, factors such as the cost of compliance relative to the resources of the subpoenaed party and the party's potential exposure to liability have been weighed. *In Re Grand Jury Subpoena Duces Tecum*, 436 F. Supp. at 51; *In Re Grand Jury Subpoena Duces Tecum (SMCRC)*, 405 F. Supp. 1192 (N.D. Georgia 1975); *United States v. Loskocinski*, 403 F. Supp. 75 (E.D.N.Y. 1975); *In Re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum*, 555 F.2d 1306 (5th Cir. 1977); *Matter of Midland Asphalt Corp.*, 616 F. Supp. 223 (W.D.N.Y. 1985).

Though courts have evidenced a willingness to consider a party's financial ability to comply with a subpoena, they have also strongly adhered to the general rule which re-

quires the recipient of a grand jury subpoena duces tecum to bear the costs of compliance. *Matter of Midland Asphalt Corp.*, 616 F. Supp. at 225; *In Re Grand Jury Subpoena Duces Tecum*, 436 F. Supp. at 51. Underlying this rule are both a recognition of the importance of the grand jury's broad investigatory power, *In Re Grand Jury Subpoena Duces Tecum*, 342 F. Supp. at 7, and the notion that " 'there is a public obligation to provide evidence . . . and that this obligation persists no matter how financially burdensome it may be.' " *In Re Grand Jury Subpoena Duces Tecum*, 436 F. Supp. at 48 quoting *Hurtado v. United States*, 410 U.S. 570, 589, 93 S.Ct. 1157, 1164, 35 L.Ed 2d 508 (1973). Indeed, in *In Re Grand Jury Subpoena Duces Tecum*, this court characterized the expenses of compliance as part of a party's "necessary contribution to the welfare of the public." 436 F. Supp. at 51.

Thus, a party seeking to challenge a subpoena must make a clear showing of unreasonableness or oppressiveness before a court will quash or modify a grand jury subpoena duces tecum on the basis of the cost of compliance. *Matter of Midland Asphalt Corporation*, 616 F. Supp. at 225 (subpoena not "unduly onerous" where costs of production represented 2% of company's total operating expenses); *United States v. Loskocinski*, 403 F. Supp. at 79-80 (subpoenaed bank met its burden of showing unreasonableness where it demonstrated that compliance with subpoena would expose bank to potential liability of $50,000,000).

After carefully reviewing the submissions of both parties in the case at bar, this Court finds that the corporation has failed to satisfy its burden of demonstrating the unreasonableness or oppressiveness of the subpoena. The corporation asserts that the task of photocopying the requested documents is too monumental for its current staff and that in order to stay in operation it will have to hire

outside employees to do the job. While this will undoubtedly pose an inconvenience to the corporation, it hardly constitutes an unduly onerous burden, especially since the corporation has not produced any evidence of a financial inability to hire such extra help.

Indeed, in measuring a company's financial ability to comply, courts faced with similar challenges to the reasonableness of subpoena, have refused to take duplicating costs into account where the subpoena has, as in this case, requested original documents. *In Re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum v. United States*, 555 F. 2d at 1307-08; *Matter of Midland Asphalt Corp.*, 616 F. Supp. at 225. These courts have pointed out that, in all but the unusual instance, reproduction is undertaken solely for the convenience of the company. *In Re Grand Jury No. 76-3 (MIA) Subpoena Duces Tecum*, 555 F.2d at 1308.

Here, however, the Court recognizes that factors beyond the convenience of the corporation are involved. Food and Drug Administration Regulations specify that a corporation involved in the manufacture of drugs must maintain certain records on the premises where the activities occurred. 21 C.F.R. § 211, 180(C). While it appears unlikely that compliance with a grand jury subpoena would result in the imposition of sanctions by the government, the corporation's legal obligation to preserve these records provides a justification for desiring to photocopy the documents that goes beyond mere convenience. Hence, the company is ordered to proceed with production on a schedule, set out in the attached order, that has been modified to take some account of reproduction time.

Finally, the corporation contends that, for the reasons discussed above, the subpoena constitutes an unreasonable search and seizure in violation of the Fourth Amendment. In *United States v. Miller*, the Supreme Court held that the Fourth Amendment, as applied to a subpoena

duces tecum, guards only against requests that are too indefinite, overbroad or lacking specificity. *United States v. Miller*, 425 U.S. 435, 446-47; 96 S.Ct. 1619, 1625 (1976); *see also, United States v. Under Seal*, 745 F.2d 834, 837-38 (4th Cir. 1984). Since the corporation, in this case, has not contested the relevance or specificity of the subpoena, the Court finds their Fourth Amendment claim to be without merit.

/s/ EDWARD S. NORTHROP
Edward S. Northrop
Senior United States District Judge

Dated: 3rd October 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CRIMINAL NO. N-86-2126

IN THE MATTER OF THE GRAND JURY
SUBPOENA ON JULY 12, 1986

ORDER

In accordance with the foregoing Memorandum, and for the reasons stated therein, IT IS, this 3rd day of October, 1986, by the United States District Court for the District of Maryland, ORDERED;

1. That the motion to quash filed by the subpoenaed corporation, (hereinafter 'the corporation'), BE, and the same hereby IS, DENIED;

2. That the motion to comply filed by the government BE, and the same hereby IS, GRANTED with the modifications set out below;

3. That within 30 days of the day of this Order, the corporation is hereby ordered to produce, in accordance with the terms of the Grand Jury Subpoena Duces Tecum of June 12, 1986, the documents requested in paragraphs 2, 4 and 12 of the subpoena with the following modifications;

a. The corporation shall produce all inventory use records identified in paragraph 2 of the subpoena which bear dates of 1983 or 1984.

b. The corporation shall produce all batch production and control records, as identified in paragraph 4, for the years 1983 or 1984.

c. The corporation shall, in accordance with paragraph 14, produce statements or qualifications, home addresses and home telephone numbers of all the corporation's personnel, including consultants, and the timecards

of all corporate personnel who at any time signed or initialed batch records or quality control records.

4. That within 90 days of the date of this Order, the corporation is hereby ordered to fully produce, in accordance with the terms of the Grand Jury Subpoena Duces Tecum of June 12, 1986, the documents requested in paragraphs 9, 10, 11, 13 and 15 of the subpoena. In addition, within this same time period, the corporation is ordered to produce the documents requested in paragraphs 1, 3, 6, 7, 8 and 16 of the subpoena with the following modifications;

a. In accordance with paragraph 1, the corporation shall produce its receiving records for 1983 and 1984, excluding invoices, bills of lading and freight bills.

b. In accordance with paragraph 3, the corporation shall produce all aspartame records referred to in that paragraph excluding invoices, bills of lading and freight bills.

c. In accordance with paragraph 6, the corporation shall produce all laboratory test records for 1983-84.

d. In accordance with paragraph 7, the corporation shall produce all laboratory test records of components for 1983-1984.

e. In accordance with paragraph 8, the corporation shall produce all distribution records for 1985.

f. In accordance with paragraph 16, the corporation shall produce all written reports on production of drugs excluding documents devoted exclusively to marketing strategy and new product development.

5. That the corporation hold all other documents requested by the Grand Jury Subpoena Duces Tecum of June 12, 1986, for which production has not herein been ordered, until such time as the government requests these documents in writing.

6. That, upon receipt of a written request for the remaining documents, or any portion of the same, the corporation is ordered to produce the documents within 30 days of their receipt of such written request.

7. That the Clerk of the Court shall mail copies of this Order and the foregoing Memorandum to counsel for the parties in this case.

/s/ EDWARD S. NORTHROP
Edward S. Northrop
Senior United States District Judge

Dated: 3rd October 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CRIMINAL NO. N-86-2126

IN THE MATTER OF THE GRAND JURY
SUBPOENA JUNE 12, 1986

DEC 18 1986

MEMORANDUM

By order dated October 3, 1986, this Court denied a motion to quash[1] and ordered a certain corporation[2] ("the corporation") engaged in the manufacture of prescription drugs to comply with a subpoena duces tecum issued by the grand jury in the District of Maryland and directed to the corporation. The order of October 3rd, commanded the corporation to begin producing a portion of the subpoenaed documents within 30 days of that date. On October 29, 1986 pursuant to Fed.R.Crim.P. 17(c) the corporation filed a renewed motion to quash the grand jury subpoena on a ground not raised in its earlier motion, contending that the subpoena violates the Fifth Amendment's prohibition against compelled self-incrimination.

[1] In its original motion the Corporation urged that the supoena be quashed on three grounds contending that; 1) the subpoena was improperly served; 2) compliance with the subpeona would be oppressive and unreasonable, and 3) that the subpoena violated the Fourth Amendment.

[2] It the interest of preserving the secrecy of the ongoing grand jury investigation which produced this subpoena, the subpoenaed corporation will be referred to as 'the corporation' and the corporation's president will be called 'the president' throughout this opinion. The original motion filed in this sealed matter identifies the parties.

After a careful review of the pleadings submitted by the parties in this case, the Court finds that no hearing is necessary. Local Rule 6. For the reasons set out below the corporation's renewed motion to quash will be denied.

The subpoenaed corporation is a business involved in the manufacture, production and distribution of generic prescription drugs. Stock in the company is held by four shareholders. The company's founder and president ("the president") owns 97 per cent of the stock while three of his children each own one per cent. Carl Turner, a Food and Drug Administration Compliance officer familiar with the operation of the corporation, estimated, in an affidavit, that the subpoenaed corporation has a gross income in excess of $50,000,000 and employs over 100 employees.

In August of 1985, the United States Government filed a civil suit against the corporation, its president and another individual alleging violations of the Federal Food, Drug and Cosmetic Act. This suit was resolved on November 4, 1985 when the parties entered into a consent decree of permanent injunction which enjoined the defendants from introducing or delivering for introduction into interstate commerce any drug manufactured, processed, packed, labeled or held at the plant unless and until all such procedures were conducted in conformity with good manufacturing practice regulations. In the consent decree, the defendants agreed to maintain a variety of records relating to the manufacture and distribution of these drugs and to make these documents available to the Food and Drug Administration (FDA) for inspection and copying.

On June 12, 1986, the grand jury in the District of Maryland issued a subpoena duces tecum to the corporation in furtherance of an investigation of illegal practices in the manufacture of prescription drugs. The subpoena sought the production of sixteen categories of documents relating to the corporation's production and distribution

of certain drugs, most of which were prepared by the corporation's manufacturing and quality control personnel during the period of 1983-1985.[3] The corporation has estimated that the subpoena would require the production of approximately one million documents.

Service of the subpoena was effected on July 24, 1986 when it was delivered to an accountant employed by the corporation. The subpoena is directed solely to the corporation itself. The definition section of the subpoena makes clear, however, that where a paragraph of the subpoena refers to the corporation by name this request encompasses relevant records prepared, not only by the corporation and a second specified company, but also those generated by "all affiliated predecessor and successor corporations, partnerships and other legal entities, and all officers, agents, servants, employees and/or consultants in active concert or participation with any of the foregoing who are acting for such companies or entities, wherever located."

In the presently pending renewed motion to quash, the president of the subpoenaed corporation claims that he is entitled to assert a fifth amendment privilege against self incrimination as to the subpoenaed documents and the act of producing them. The Court must first consider whether the president of the corporation may avail himself of the protection afforded by this privilege.

It is well settled fifth amendment jurisprudence that the privilege against compulsory self incrimination "is essentially a personal one, applying only to natural individuals."

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[3] Specifically, the subpoena requests the production of Receiving Records, Inventory Use Records, Receiving and Inventory Records for Aspartame, Batch Records, Master Production and Control Records, Laboratory Test Records, Laboratory Test Records of Components, Distribution Records, Deficient Production Records, Returned Drug Records, Investigation Records, Personnel Records, Media Fill Records, Equipment Records, Complaint Records and Consultant Reports.

United States v. White, 322 U.S. 694, 698, 64 S.Ct. 1248, 1251 (1944). Thus, although a sole proprietor or sole practitioner may claim the privilege, a collective entity "an organization which is recognized as an independent entity apart from its members", may not. *Bellis v. United States*, 417 U.S. 85, 88-89, 92, 94 S.Ct. 2179, 2182-2183, 2185 (1974).

Since a corporation, as a collective entity, has no Fifth Amendment privilege of its own, the Supreme Court has repeatedly held that when a subpoena seeks corporate records, an individual may not assert a Fifth Amendment privilege to avoid producing potentially incriminating corporate records which are in his possession in a representative capacity. *Bellis*, 94 S.Ct. at 2183. "It is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be." *Id.* at 2189. This rule applies whether the subpoena is addressed to the corporation itself or to an individual in his representative capacity. *Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538 (1911) (subpoena directed to corporation); *Dreier v. United States*, 221 U.S. 394, 31 S.Ct. 550 (1911) (subpoena directed to individual corporation officer).

In *Bellis*, the Supreme Court identified two primary reasons underlying the refusal to allow a corporate representative to claim a Fifth Amendment privilege when corporate documents are requested by the government. First, the Supreme Court has consistently stressed that the Fifth Amedment privilege was designed to protect individuals and was not meant to restrict valid governmental regulation of economic entities. "The framers of the constitutional guarantee against compulsory self disclosure, who were interested in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate government

regulations." *Id.* at 92, 94 S.Ct. at 2184, quoting *United States v. White*, 322 U.S. at 700, 64 S.Ct. at 1251. In view of that fact that corporate records can be produced only through the acts of its of agents or officers, the Court recognized that granting a Fifth Amendment privilege to such individuals would undermine the rule that a corporation cannot claim the privilege and "largely frustrate legitimate governmental regulation of such organizations." *Bellis*, 417 U.S. at 91, 94 S.Ct. at 2184.

The second basis for the rule rested upon the privacy rationale often ascribed to the Fifth Amendment privilege. Traditional Fifth Amendment analysis held that the privilege was conceived in order to ensure than an individual's privacy remain sacrosanct. Thus, the Fifth Amedment was to protect " 'a private inner sanctum which necessarily includes an individuals' papers and effects to the extent that the privilege bars their compulsory production and authentication-and 'proscribes state intrusion to extract self condemnation.' " *Id.* at 92, 94 S.Ct. at 2184-85, quoting *Couch v. United States*, 409 U.S. 322, 327 (1973). The records of a collective entity, even where under an individual custodian's control, could not lay claim to such a protected privacy interest. Unlike an individual's personal papers, these documents, often regulated by statute and accessible to a variety of people, were held to have taken on a public character.

In the case at bar, the corporation's president claims that he is entitled to assert a Fifth Amendment privilege on two basis. First, he contends that the corporation, in this case, ought to be treated as a sole proprietorship. Alternatively, he argues that the Supreme Court's decisions in *Fisher v. United States*, 425 U.S. 412, 96 S.Ct. 1569 (1976) and *United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237 (1984) have altered the traditional analysis of the Fifth Amendment privilege so as call into question the continuing viability of the collective entity doctrine discussed in *Bellis*.

Turning first to the characterization of the business in this case, the president urges the court to disregard the company's corporate form and treat it as a sole proprietorship. In support, the president contends that because he owns 97% of the stock and is the only shareholder involved in the management of the company as well as its president and founder, the business is actually a de-facto sole proprietorship. As a sole proprietorship he then claims a Fifth Amendment privilege as to both the contents of the requested records and the act of producing them.

A sole proprietorship may claim a Fifth Amendment privilege as to its business records, *Bellis*, 94 S.Ct. at 2182-83, and the act of producing such documents, *United States v. Doe*, 104 S.Ct. at 1239, 1245. A bright line, however, has been drawn between a sole proprietorship, inseparable from its owner, and a corporation, the quintessential collective entity.[4]

In *Bellis*, the Supreme Court made clear that the prohibition against corporate use of the Fifth Amendment privilege applies regardless of the size of the corporation. *Bellis*, 94 S.Ct. at 2189. Courts have consistently refused to disregard the corporate form where an individual has chosen to do business as such. *See e.g. In re Two Grand Jury Subpoena Duces Tecum*, 769 F.2d 52, 59 (2d Cir. 1985) (three shareholder corporation in which majority shareholder was sole operating officer and director); *United States v. Antonio J. Sancetta, M.D., P.C.*, 788 F.2d 67, 74 (2d Cir. 1986) (corporation composed of one

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[4] The Court's unwillingness to regard a corporation as anything but a collective entity is in contrast to its recognition that a partnership might, in some very limited circumstances, be treated as a sole proprietorship. *Bellis*, 94 S.Ct. at 2189; *In Re Jury Subpoena Duces Tecum (Doe)*, 605 F.Sup. 174, 175 (S.D.N.Y. 1985). Cases cited by the corporation dealing with the characterization of a partnership are thus inapposite here.

shareholder who also served as its director, president, vice-president and treasurer).

In the case at bar, the president of the subpoenaed corporation, like the appellant in *Two Grand Jury Subpoenae,* chose to do business in the corporate form "in order to gain its attendant benefits; he cannot now disregard this form in order to shield its business records from production." 769 F.2d at 59. Hence, this Court will not treat the subpoenaed corporation as a sole proprietorship for purposes of applying the Fifth Amendment privilege.

Next, the president of the corporation contends that, even if the corporation is not viewed as a sole proprietorship, he is still entitled to assert a Fifth Amendment privilege under the act of production standard set out by the Supreme Court in *Fisher* and *Doe*.

In *Fisher*, the Court re-examined the purported rationale underlying the Fifth Amendment privilege. Eschewing the traditional privacy analysis employed in many previous cases, the Court sought to refocus the inquiry: "[w]e cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy . . . . We adhere to the view that the Fifth Amendment protects against 'compelled self-incrimination, not [the disclosure of] private information.' " 96 S.Ct. at 1576, quoting *United States v. Nobles*, 422 U.S. at 225, 233 n.7, 95 S.Ct. at 2160 (1975). Thus, the Court held that, in order to claim the privilege, an individual must demonstrate the presence of personal compulsion being used to illicit testimonial self-incrimination. The Court went on to find that an individual's act of producing evidence in response to a subpoena contained the requisite element of compulsion. If such a compelled act also forced an individual to produce evidence which was both testimonial and incriminating, the Fifth Amendment privilege would attach. *Id.* at 1581.

Subsequently, in *United States v. Doe*, the Supreme Court held that the act of production doctrine, outlined in *Fisher*, applied to a sole proprietor seeking to claim the Fifth Amendment privilege against producing voluntarily prepared business records in response to a government subpoena. 104 S.Ct. at 1245. There, the Court accepted the lower courts' findings that compliance with the subpoena would involve testimonial self incrimination since, by producing the documents, the subpoenaed individual would admit the existence of the records, his possession of them and their authenticity. *Id.* at 1243.

In the case at bar, the president seeks to invoke the Fifth Amendment privilege based upon the act of production doctrine outlined in *Fisher* and *Doe*. While recognizing that *Doe* involved a subpoena issued to a sole proprietor, the president argues that "nothing in the language, rationale, or holding in this case would indicate that the standard announced for determing the application of the privilege against self incrimination to compelled production of documents is to be applied only to documents held by a sole proprietorship." Movant's Memorandum in Support of Renewed Motion to Quash Grand Jury Subpoena. In effect, the president urges this Court to rule that, in refocusing traditional analysis of the scope of the Fifth Amendment privilege, *Fisher* and *Doe* tacitly abolished the collective entity doctrine of *Bellis*.

The Fourth Circuit recently addressed this very issue in *United States v. Lang*, 792 F.2d 1235 (4th Cir. 1986). There the court was asked to decide whether a supoenaed individual, holding corporate documents in representative capacity, might claim a fifth amendment privilege against the act of producing the documents.

In considering this issue, the Fourth Circuit acknowledged the impact of *Fisher* and *Doe* on this area, noting that the "clear division between production of papers with personal content and corporate content has

been blurred by recent court decisions shifting the focus away from the privacy interest of an individual in his personal papers and toward protection against testimonial self-incrimination." *Id.* at 1238.

The Court went on to survey the treatment other circuits have accorded the collective entity doctrine in light of these recent cases. They found that the majority of circuits have affirmed the continuing validity of this doctrine despite the holdings in *Fisher* and *Doe*. *Id.* at 1239. *See e.g., In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941, 945 (10th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 90 (1984); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143 (6th Cir. 1985). Only the Third Circuit has held that as a general matter a corporate custodian to whom a subpoena is addressed may invoke the fifth amendment privilege as to documents held in a representative capacity. *Id.* at 1239. *See In re Grand Jury Matter (Brown)*, 768 F.2d 525, 528 (3d Cir. 1985) (*en banc*).[5]

Declining to adopt either of these approaches, the Fourth Circuit opted to follow the rule established by the Second Circuit in *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52 (2d Cir. 1985). The Fourth Circuit summarized the Second Circuit's approach as follows:

> . . [t]he basic rule of *Bellis* continues after *Doe*, and normally a corporate representative or agent cannot

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[5] Shortly before the Fourth Circuit's decision in *Lang*, the Eighth Circuit joined the circuits cited in *Lang* and upheld the collective entity doctrine. In apparent recognition of the conflict between the Third Circuit and the other circuits who have addressed this issue, the Supreme Court granted certiorari in the Eighth Circuit case. *See, In Re Grand Jury Subpoena (85-W-71-5)*, 784 F.2d 857, 861-62, ((8th Cir. 1986), *cert. granted, See v. United States*, ____ U.S. ____ 107 S.Ct. 59 (Oct. 6, 1986).

> claim a fifth amendment privilege against producing corporate documents. There will be rare occasions where an individual's production of those documents may amount to testimonial self-incrimination. In those limited circumstances, the individual has a personal fifth amendment privilege, but the corporation must comply with the summons through some other person.

Lang, 792 F.2d at 1240-41. Thus, it is clear that the collective entity doctrine enunciated in *Bellis* survives, basically intact, in the Fourth Circuit.

The Court, however, must consider whether the case at bar presents one of those "rare occasions" in which a corporate representative is entitled to claim a personal fifth amendment privilege against the act of producing corporate documents. For this unusual circumstance to occur, "[t]he individual must be personally compelled to produce and authenticate corporate records and those acts must be self-incriminatory." *Lang*, 792 F.2d at 1240.

Such a situation is not posed by the instant case, for here, the element of personal compulsion against the corporation's president is lacking. The subpoena in this case was addressed neither to the president as an individual nor to the president in a representative capacity. The subpoena is directed solely to the corporation.

As the Supreme Court made clear in *Fisher*, the element of *personal* compulsion is an essential prerequisite to the invocation of the Fifth Amendment privilege. 96 S.Ct. at 1574. There, the Court held that a taxpayer was not entitled to assert the privilege to bar enforcement of a summons directing his attorney to produce documents the taxpayer had placed in his care. The Court reasoned,

> " '[t]he Amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*.' " (Emphasis in original.) 'It is extortion of information from the accused himself that of-

> fends our sense of justice.' *Couch v. United States, supra*, 409 U.S. at 328, 93 S.Ct. at 616, 34 L.Ed.2d at 554. Agent or not, the lawyer is not the taxpayer. The taxpayer is the 'accused,' and nothing is being extorted from him." *Id.*[6]

In the case presently before this Court, the subpoena compels only the corporation, not the president to produce corporate records. Thus, the Court faces a factual situation similar to that in *In re Grand Jury Subpoenas Issued to Thirteen Corps.*, 775 F.2d 43 (2d Cir. 1985). There, the government issued subpoenas to thirteen

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[6] The president of the corporation in this case also seeks to assert a Fifth Amendment privilege as to the contents of those subpoenaed documents kept pursuant to FDA regulations and the consent decree of November, 1985. *See* 21 C.F.R. Part 211, Subparts J and K. While documents maintained pursuant to a consent decree, voluntarily entered into by the parties, can hardly be considered compelled, documents kept pursuant to federal regulations may be so considered.

Here, however, as with the act of production discussed above, the element of personal compulsion against the corporation's president is missing. Responsibility for compliance with FDA regulations lies with the corporation. In addition, the corporation has presented no evidence suggesting that any of the subpoenaed records kept in order to comply with FDA regulations were actually authored or prepared by the corporation's president. Indeed, the record indicates that the bulk of these documents were prepared by the corporation's quality control and manufacturing personnel. To paraphrase the Supreme Court in *Fisher*: agent or not, a quality control or manufacturing employee is not the corporation president.

Given this lack of personal compulsion, we need not consider whether these particular records fall within the "required records" exception to the Fifth Amendment or whether, as the corporation contends, this exception was abandoned by the Supreme Court in *Fisher* and *Doe*. It should be noted, however, that the Circuits which have considered the interplay between these cases and the required records exception have affirmed the continuing validity of that exception. *See, Doe & Roe v. United States*, 801 F.2d 1164 (9th Cir. 1986); *In Re Grand Jury Subpoena Duces Tecum (Underhill)*, 781 F.2d 64 (6th Cir. 1986).

corporations. Despite the fact that the subpoenas were addressed solely to the corporations, an individual intimately involved in the management of the various corporations sought to invoke a personal Fifth Amendment privilege against producing certain corporate documents in his possession. The court refused to quash the subpoenas commenting that "[by] directing the subpoenas to the corporations, the government must be satisfied with production by any representative of the corporations; strictly speaking, the proceedings are between the government and the corporation." *Id.* at 46.

Indeed, to reach any other result would allow the rare exception in *Lang* to swallow the general rule enunciated in *Bellis*. While the *Lang* court found that, in limited circumstances, an individual personally compelled to produce corporate documents in a representative capacity might claim the Fifth Amendment privilege, the Court firmly held that this did not relieve the corporation itself of its duty to comply with the summons. Once again the court approvingly cited the approach adopted by the Second Circuit, noting that even where a corporate representative was entitled to claim a privilege, the corporation itself was ordered "to comply with the summons by producing *someone*—any knowledgeable employee, or even a new agent—to testify about the records." 792 F.2d at 1240 (emphasis in original). Similarly, in this case, the Court cannot permit the corporation's president, as a self-appointed custodian, to assert that he is the *only* person capable of complying with the subpoena. The corporation's obligation is unimpeded; if it chooses to excuse the president from assisting in producing the re-

quested documents "*someone*—any knowledgeable employee, or even a new agent" must carry out the task. *Id.*

/s/ EDWARD S. NORTHROP
Edward S. Northrop
Senior United States District Judge

Dated: 18th December 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. N-86-2126

IN THE MATTER OF THE GRAND JURY
SUBPOENA JUNE 12, 1986

DEC 18 1986

ORDER

On October 29, 1986, the corporation subpoenaed in the above captioned case, filed a renewed motion to quash the Grand Jury Subpoena of June 12, 1986 on fifth amendment grounds. In response, the government filed a motion seeking an order holding the subpoenaed corporation in civil contempt of this Court's Order of October 3, 1986 and asking that the Court impose a $1,000 per day fine for each day after November 3, 1986 on which the documents referred to in the October 3, 1986 Order are not produced.

After careful consideration of the papers submitted by the parties in this case, and in accordance with the foregoing Memorandum, and for the reasons stated therein, IT IS, this 18th day of December, 1986, by the United States District Court for the District of Maryland ORDERED;

1. That the renewed motion to quash filed by the subpoenaed corporation BE, and the same hereby IS, DENIED;

2. That the subpoenaed corporation is hereby ordered to immediately begin producing subpoenaed documents in accordance with the terms set out in this Court's Order of October 3, 1986;

3. That the government's motion for an Order of Contempt BE, and the same hereby IS, DENIED, without prejudice to the government's right to renew this motion

should the subpoenaed corporation demonstrate a failure to comply with the terms of this Order; and

4. That the Clerk of the Court shall mail copies of this Order and the foregoing Memorandum to counsel for the parties in this case.

/s/ EDWARD S. NORTHROP

Edward S. Northrop
Senior United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-5503
(Under Seal)

In Re: Grand Jury Subpoena:
IN RE: GRAND JURY SUBPOENA

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

(UNDER SEAL), DEFENDANT-APPELLANT.

Appeal from the United States District Court for the District of Maryland, at Baltimore, Edward S. Northrop, Senior District Court Judge. (CR N 86-2126).

Argued: June 4, 1987 Decided: September 28, 1987

Before WILKINS and WIDENER, Circuit Judges, and SMALKIN, United States District Judge for the District of Maryland, by designation.

Kevin Anthony Dunne (Jerald J. Oppel and Ober, Kaler, Grimes & Shriver on brief) for Appellant; Anita Johnson, Office of Consumer Litigation, Department of Justice (Richard K. Willard, Assistant Attorney General, on brief) for Appellee.

PER CURIAM:

This is an appeal from an order of the District Court denying a renewed motion to quash a grand jury subpoena. The renewed motion was based on an asserted violation of the Fifth Amendment's prohibition against self-incrimination.

The subpoenaed corporation is involved in the manufacture, production, and distribution of generic prescription drugs, including veterinary preparations. The founder and president of the company, Mr. X, owns 97 per cent of the stock; the remaining 3 per cent is held by his three children, each of whom holds 1 per cent. The company has a gross income in excess of 50 million dollars annually and employs more than 100 persons. In August, 1985, it and Mr. X were made parties defendant in a civil suit alleging violation of the Federal Food, Drug and Cosmetic Act, which was resolved by a consent decree entered November 4, 1985, calling for conformity on the part of the corporation with good manufacturing practice regulations. In the consent decree, the defendants agreed to maintain a variety of records with regard to the drugs prepared, manufactured, and distributed by the corporation.

The subpoena under attack was issued by a Grand Jury of the District of Maryland on June 12, 1986, seeking production of 16 categories of documents relating to production and distribution of certain drug preparations during 1983-1985. These records are routinely maintained records such as receiving records, inventory use records, laboratory test records, etc.

The basis upon which the subpoena was attacked in the District Court was a contention by the president of the corporation, Mr. X, that he is entitled to assert a Fifth Amendment privilege with regard both to the corporate documents and to the act of producing them. The District Court held that a collective entity, such as a corporation, may not assert the Fifth Amendment privilege as a bar to a grand jury subpoena, even in situations where a sole proprietor might. *Bellis v. United States*, 417 U.S. 85, 88-89 (1974). Mr. X unsuccessfully argued below that, because he owns practically all the stock of the corporation, it

ought to be treated as a sole proprietorship. He also unsuccessfully argued below that subsequent decisions of the Supreme Court, *viz., Fisher v. United States*, 391 U.S. 412 (1976) and *United States v. Doe*, 465 U.S. 605 (1984), have undercut the continuing viability of the *Bellis* doctrine. The District Court rejected both of these arguments, relying upon, *inter alia, United States v. Lang*, 792 F.2d 1235 (4th Cir. 1986). The District Court further held that this case did not present one of the unusual circumstances in which the Fifth Amendment privilege would be available on account of a requirement that the individual produce and authenticate the records himself, which acts are necessarily self-incriminatory. *United States v. Lang*, 752 F.2d at 1240. The District Court, accordingly, entered an order directing production by the corporation. The District Court has not, however, as yet entered an order of contempt in aid of that order.

A threshold question has been raised as to the propriety of our considering this appeal before the entry of a contempt order. *See, e.g., In re Grand Jury Subpoena, May 1978 at Baltimore*, 596 F.2d 630, 632 (4th Cir. 1979). At oral argument, counsel for the Government, while adhering to the view that this appeal is premature before a contempt order has been issued, conceded the better course in this case is to reach the merits of the appeal, in view of the long delay already engendered in the investigation by the two motions to quash in the district court and the current appeal, and in light of the almost absolute certainty of another appeal raising the same substantive issue, should the present appeal not be addressed on the merits.

We think that there is sufficient legal authority to consider the appeal on the merits at this time, notwithstanding the absence of a contempt order or the formal intervention of Mr. X as a party. This Court has recognized that a third party may contest a Grand Jury subpoena without an adjudication of contempt where he claims that a privilege he

individually holds will be violated by the subpoenaed party's compliance. *United States v. Jones*, 696 F.2d 1069, 1071 (4th Cir. 1982). Although the third party's presence in the case must usually be established by a motion to quash or a motion to intervene, *see United States v. Under Seal*, 748 F.2d 871, 873 n.2 (4th Cir. 1984), neither of which has been filed by Mr. X in this case, this Court notes that the parties and the district court have consistently treated Mr. X as if he were a party to this litigation, even though he has not formally moved to intervene. In such circumstances, the appellate court may hear the appeal, but should direct, as we now do, the district court to enter an order of intervention *nunc pro tunc* on remand. *See Roach v. Churchman*, 457 F.2d 1101, 1104 (8th Cir. 1972). This unusual course, justified by the unique facts and circumstances of this case, will allow this Court to address the appeal on the merits, without further, wasteful delay.

On the merits, this Court agrees completely with the analysis and conclusions of the District Judge, and it affirms on the basis of his well-reasoned opinion, *In re: Grand Jury Subpoena, June 12, 1986*, CR No. N 86-2126 (D. Md. Dec. 18, 1986).

AFFIRMED AND REMANDED FOR THE ENTRY OF AN ORDER OF INTERVENTION NUNC PRO TUNC

(2)

Supreme Court, U.S.
FILED
JAN 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-921

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN D. COPANOS & SONS, INC., ET AL.

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-921

JOHN D. COPANOS & SONS, INC., ET AL.

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the president of a corporation may volunteer to be the custodian of subpoenaed corporate documents and then assert his personal Fifth Amendment privilege against compulsory self-incrimination to shield the documents from production to the grand jury.

1. On June 12, 1986, a federal grand jury investigating possible violations of the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 301 *et seq.*, in connection with the manufacturing of injectable antibiotic drugs, issued a subpoena to petitioner John D. Copanos & Sons, Inc. (hereinafter the corporation).[1] The subpoena was addressed to "John D. Copanos & Sons, Inc." and did not

[1] The corporation and the government previously entered into a consent decree. The decree requires the corporation to comply with the FDA's good manufacturing practice regulations, to maintain a variety of records relating to the manufacture and distribution of drugs, and to make those records available to the FDA for inspection and copying (Pet. App. 12a, 27a).

name any individual in any capacity. The corporation moved to quash the subpoena on the ground that producing the records would violate the Fifth Amendment privilege against compulsory self-incrimination of petitioner John Copanos, the president of the corporation. The corporation argued that production of its corporation documents would incriminate petitioner Copanos, because he was allegedly the only person able to produce the documents.[2]

The district court denied the motion and ordered the corporation to produce the documents (Pet. App. 11a-25a; 658 F. Supp. 387). The court ruled that a corporation cannot invoke the Fifth Amendment privilege, and that petitioner Copanos could not invoke his own Fifth Amendment privilege against production of the documents, because the subpoena was directed to the corporation, not to him (Pet. App. 13a-22a). As the court found, "[t]he subpoena in this case was addressed neither to the president as an individual nor to the president in a representative capacity. The subpoena is directed solely to the corporation" (*id.* at 20a). The court also rejected petitioner Copanos' claim that he is the only person capable of complying with the subpoena, and it directed the corporation to produce the subpoenaed documents through " '*someone*'—any knowledgeable employee, or even a new agent" (*id.* at 23a (emphasis in original)).

The court of appeals affirmed the district court's judgment on the basis of the district court's opinion (Pet. App. 29a). The court of appeals later denied petitioners' motion for a stay of its judgment.[3]

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[2] According to an affidavit submitted by an FDA compliance officer familiar with the operation of the corporation, the corporation has more than 100 employees and an estimated annual gross income in excess of $50,000,000 (Pet. App. 12a).

[3] The corporation thereafter refused to comply with the district court's order and was held in contempt on November 20, 1987.

2. The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is therefore not warranted.

a. This Court has repeatedly held that the "books and records of corporations cannot be insulated from reasonable demands of governmental authorities by a claim of personal privilege on the part of their custodian." *Curcio* v. *United States*, 354 U.S. 118, 122 (1957). See also, *e.g.*, *Fisher* v. *United States*, 425 U.S. 391, 411-412 (1976); *Bellis* v. *United States*, 417 U.S. 85, 88 (1974); *Essgee Co.* v. *United States*, 262 U.S. 151 (1923); *Wilson* v. *United States*, 221 U.S. 361 (1911).[4] In so holding, the Court has reasoned that, because the custodian holds the records in a purely representative capacity on behalf of the corporation, production of the records is not a personal testimonial act of the custodian implicating his Fifth Amendment rights. *E.g.*, *Bellis*, 417 U.S. at 90. If the law were otherwise, the custodian could prevent the government from obtaining the records of his corporation despite the settled rule that corporations and other collective entities have no Fifth Amendment privilege. *Ibid.* The very purpose of the "collective entity" rule—namely, to facilitate government regulation of corporations and other artificial entities—could thus be easily defeated.

In 1984, in *United States* v. *Doe*, 465 U.S. 605, the Court held that the production of business records by a sole proprietor may be a testimonial act protected by the Fifth Amendment. Unlike a corporation, a sole proprietor-

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[4] The Court has stated in the clearest possible terms that this rule applies to corporations such as the one involved here: "It is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be." *Bellis*, 417 U.S. at 100.

ship is not a collective entity, and nothing in the *Doe* opinion purports to reject the collective entity rule. It is true, as petitioner points out, that in the wake of *Doe* the courts of appeals have adopted differing approaches to the question whether the custodian of corporate records who is subpoenaed in his individual capacity may invoke the Fifth Amendment.[5] That difference of opinion does not aid petitioner, however, because *no* circuit allows a corporation to resist the production of its records altogether through the custodian's personal privilege. The five circuits (including the one below) that permit the custodian to invoke his personal privilege all hold that, if the government so requests, a corporation must produce subpoenaed records through some other person. *E.g.*, *In re Sealed Case*, 832 F.2d 1268, 1278, 1282 & n.9 (D.C. Cir. 1987);

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[5] Several circuits have reaffirmed the traditional rule that the custodian of corporate records may not invoke his Fifth Amendment privilege to refuse to comply with a subpoena for those records. See *In re Grand Jury Proceedings (Doe)*, 814 F.2d 190 (5th Cir. 1987), cert. granted *sub nom. Braswell* v. *United States*, No. 87-3 (Oct. 5, 1987); *In re Grand Jury Subpoena*, 784 F.2d 857 (8th Cir. 1986), cert. granted *sub nom. See* v. *United States*, No. 85-1987 (Oct. 6, 1986), cert. dismissed, No. 85-1987 (Jan. 15, 1987); *In re Grand Jury Proceedings (Morganstern)*, 771 F.2d 143 (6th Cir.) (en banc), cert. denied, 474 U.S. 1033 (1985); *United States* v. *Malis*, 737 F.2d 1511 (9th Cir. 1984); *In re Grand Jury Proceedings (Vargas)*, 727 F.2d 941 (10th Cir.), cert. denied, 469 U.S. 819 (1984).

On the other hand, five circuits – although they differ considerably with one another in approach – hold, contrary to the traditional rule, that there are at least some limited circumstances in which a custodian of corporate records may resist a subpoena on the basis of his personal Fifth Amendment privilege. See *In re Sealed Case*, 832 F.2d 1268, 1279 & n.7 (D.C. Cir. 1987); *In re Grand Jury No. 86-3 (Will-Roberts Corp.)*, 816 F.2d 569 (11th Cir. 1987), stay denied *sub nom. Roberts* v. *United States*, No. A-770 (Apr. 27, 1987); *United States* v. *Lang*, 792 F.2d 1235, 1240 (4th Cir. 1986), cert. denied, No. 86-420 (Dec. 1, 1986); *United States* v. *Antonio J. Sancetta*, 788 F.2d 67, 74 (2d Cir. 1986); *In re Grand Jury Matter (Brown)*, 768 F.2d 525 (3d Cir. 1985) (en banc).

In re Special Federal Grand Jury Empanelled October 31, 1985, 819 F.2d 56, 57 n.1 (3d Cir. 1987); *In re Grand Jury No. 86-3 (Will Roberts Corp.)*, 816 F.2d 569, 573-574 (11th Cir. 1987), stay denied *sub nom. Roberts* v. *United States*, No. A-770 (Apr. 27, 1987); *United States* v. *Lang*, 792 F.2d 1235, 1240-1241 (4th Cir. 1986), cert. denied, No. 86-420 (Dec. 1, 1986); *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985). That rule has been applied even in the case of a one-person corporation. *United States* v. *Antonio J. Sancetta*, 788 F.2d 67, 74 (2d Cir. 1986); *United States* v. *Rogers Transp., Inc.*, 793 F.2d 557, 558 (3d Cir. 1986); *In re Grand Jury No. 86-3 (Will Roberts Corp.), supra.* As the Second Circuit explained in *Two Grand Jury Subpoenae*, 769 F.2d at 57, "[t]here simply is no situation in which the fifth amendment would prevent a corporation from producing corporate records." Thus, no court of appeals would uphold petitioners' claim that a corporation may refuse to comply with a subpoena simply because the production of subpoenaed documents might incriminate a corporate officer.

Petitioners claim (Pet. 6) that the question in this case is whether petitioner Copanos can be compelled to produce potentially incriminating corporate records. That claim ignores the fact (Pet. App. 20a) that the grand jury did not address its subpoena to petitioner Copanos and has not sought to compel him to do anything. The subpoena requires the corporation to produce its corporate documents, but the corporation may select anyone, even a new agent, to carry out that task. In essence, petitioner Copanos has sought to volunteer as a custodian and then invoke his personal Fifth Amendment privilege in order to defeat the corporation's obligation to comply with the subpoena. Even if the act of producing the subpoenaed documents would incriminate petitioner Copanos, the corporation can be required to find another custodian to pro-

duce them. Otherwise, a corporation could easily defeat the grand jury's right to examine corporate records. The courts below properly refused to allow petitioners to nullify the grand jury's inquiry in that fashion.[6]

b. Most of the records called for by the subpoena in this case are required to be maintained by FDA regulations.[7] Petitioner therefore argues (Pet. 9-11) that the Court should grant review to re-examine the "required records" exception to the Fifth Amendment privilege against compulsory self-incrimination. Under that exception, a party may not invoke the privilege to resist production of corporate or personal documents that are required to be kept by law. See *Shapiro* v. *United States*, 335 U.S. 1 (1948). Petitioner contends that the Court should determine whether that exception has survived this Court's decisions in *Fisher* and *Doe*. That claim lacks merit.

Neither the district court nor the court of appeals relied on the required records exception. The district court found (Pet. App. 21a n.6) that this case does not present any question whether that exception is applicable, since there was no evidence that any of the records maintained in accordance with the FDA's regulations were prepared or authored by petitioner Copanos. In fact, the court noted that the record indicated that the bulk of the documents were prepared by the corporation's quality control and

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[6] For that reason, there is no need to hold this case pending the disposition of *Braswell* v. *United States*, cert. granted, No. 87-3 (Oct. 5, 1987). The question in *Braswell* is whether the custodian of the records of a corporation may resist a subpoena that is addressed to him personally on the ground that the act of producing them would violate his personal privilege against compulsory self-incrimination. In this case, the subpoenaed records may ultimately prove incriminating to petitioner Copanos, but he has not been compelled to perform the act of production or to incriminate himself in any way.

[7] See 21 C.F.R. 211.180-211.208. The consent decree entered between the corporation and the government also requires the corporation to maintain the records (see Pet. App. 12a, 27a).

manufacturing personnel. *Ibid.* The court of appeals did not disturb the district court's finding (*id.* at 29a), and petitioners do not challenge it in this Court. This case therefore does not provide an opportunity for the Court to resolve the question presented by the petition.[8]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1988

[8] The validity of the required records exception has been upheld by every court of appeals that has examined the question since this Court's decision in *Doe*. See *In re Grand Jury Proceedings (John Doe, M.D.)*, 801 F.2d 1164, 1168-1169 (9th Cir. 1986); *In re Two Grand Jury Supoenae Duces Tecum*, 793 F.2d 69, 73 (2d Cir. 1986); *In re Grand Jury Subpoena (Underhill)*, 781 F.2d 64, 69-70 (6th Cir. 1986), cert. denied, No. 85-1668 (Oct. 6, 1986); *In re Grand Jury Matter (Brown)*, 768 F.2d at 528. See also *Underhill*, 781 F.2d at 69-70 (collecting court of appeals cases decided after *Fisher* but before *Doe* upholding the required records exception).

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